

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

## **MOTION FOR JUDGMENT BY DEFAULT**

COMES NOW your plaintiff, Joyce M. Bennett, by counsel, and moves this Court for judgment by default pursuant to Rule 12(a)(1)(A)(i), representing unto this Court as follows:

1. Defendants received personal service on November 30, 2012.
2. Mark Kinser, purportedly acting on behalf of all defendants, filed a motion to extend the date of response to civil action on December 14, 2012, requesting until January 31, 2013 to respond.
3. By Order of this Court dated January 8, 2013, it was noted that the corporate defendants must be represented by an attorney.
4. By Order of this Court dated March 1, 2013, the Court granted defendants an extension of thirty days to respond to plaintiff's complaint noting that the corporate defendants must be represented by an attorney.
5. On April 3, 2013, Mark D. Kinser filed a motion to extend the date of response to this civil action on behalf of himself and again purported to do so on behalf of the corporate defendants, Unlimited Construction, Inc. and Unlimited Construction,

Inc. Retirement Plan, despite two orders of this Court informing Mr. Kinser of his inability to represent the corporate defendants. Wherefore, Mr. Kinser's attempted response is a nullity and the corporate defendants have not responded.

6. Mr. Kinser's motion incorrectly stated that he was unaware of the date of the filing of the return of service until April 2, 2013. This is an error, as the Court's Order of March 1, 2013 stated "The plaintiff filed the return of service on February 28, 2013" and the Court set the date of Monday, April 1, 2013 for the defendants to file responsive pleadings. As of April 1, 2013, the defendants will have been served 121 days, and have yet to engage the services of an attorney or file any legitimate responsive pleadings.

7. All defendants are now in default.

The allegations of this case are straightforward in that the defendants, Mark D. Kinser and Unlimited Construction, Inc., have embezzled the pension proceeds and have used these proceeds to fund Unlimited Construction, Inc.'s projects. All defendants Mark D. Kinser and Unlimited Construction, Inc. would need to do to prove themselves not liable for these charges would be to provide the Court proof of the necessary plan documents, actuary report and evidence that the plan is properly funded and that the funds still exist. Defendant's motion represents nothing more than a delay tactic so defendants do not have to respond or present to the Court any evidence as to the disposition of the pension plan funds. No further delay should be tolerated by this Court. The corporate defendants are fiduciaries and owe to Ms. Bennett a fiduciary duty in regard to the investment of the pension plan funds and owe a duty to disclose the investments and distributions of the pension plan corpus.

WHEREFORE, your plaintiff moves this Court for the following relief:

- a. Entry of judgment by default on the issue of liability;
- b. That the Court schedule a hearing on damages;
- c. That the Court remove the defendant, Mark D. Kinser, as administrator of the plan and appoint plaintiff in his place and stead;
- d. That the Court order the defendants to deliver all documents and funds regarding the pension plan to plaintiff or alternatively to the Court; and
- e. For such other and further relief as this Court deems equitable.

Respectfully submitted,

JOYCE M. BENNETT

By: \_\_\_\_\_  
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of April, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and I hereby certify that I have mailed by United States Postal Service the documents to the following non-CM/ECF participants: the defendants Mark D. Kinser, Unlimited Construction, Inc. and Unlimited Construction, Inc. Retirement Plan, 140 East Main Street, Radford, Virginia 24141.

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Clifford L. Harrison